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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
) IB Docket No. 95-59
Preemption of Local Zoning) DA 91-577
Regulation of Satellite Earth) 45-DSS-MISC-93
Stations)
)

To: The Commission

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COMMENTS OF PRIMESTAR PARTNERS L.P.

PRIMESTAR Partners L.P. ("PRIMESTAR"), by its attorneys and pursuant to Section 1.415 of the Commission's rules (47 C.F.R. § 1.415), hereby submits these Comments in response to the Commission's Notice of Proposed Rulemaking ("Notice"), released in the above-captioned proceeding on May 15, 1995.¹

In the Notice, the Commission is proposing to modify its current rule, 47 C.F.R. § 25.104, preempting local regulation of satellite earth stations. The Commission proposes to modify the exhaustion of remedies requirement and to revise the rule to create a presumption that, with respect to satellite antennas of specified dimensions, any regulation is unreasonable if it substantially limits, or imposes substantial costs on, the use of such antennas.

PRIMESTAR generally supports the proposed procedures to expedite and facilitate the Commission's ability to review local

¹ FCC 95-59, released May 15, 1995.

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regulations affecting earth stations. PRIMESTAR's comments are directed to that portion of the Notice wherein the Commission proposes to create presumptions of unreasonableness with respect to regulation of satellite earth stations.² For the reasons set forth herein, PRIMESTAR supports the proposed presumption but believes that certain clarifications are desirable.

I. Background/Interest of PRIMESTAR

PRIMESTAR transmits television and audio programming services directly from a satellite to subscribing customers who are supplied with home satellite receiving equipment by PRIMESTAR's distributors. PRIMESTAR currently offers 73 channels of programming, including hit movies, 15 regional sports networks, breaking international and national news, family programming, home shopping, pay-per-view and digital music channels to more than 500,000 subscribers nation-wide.

Launched in 1990, PRIMESTAR was the nation's first successful Ku-band medium-power direct-to-home television service provider. In 1994, PRIMESTAR became the first direct-to-home satellite provider to offer digital compression technology for superior delivery of picture and sound. Starting at about \$1 per day (exclusive of installation costs), PRIMESTAR offers its subscribers use of all equipment (mini-satellite dish, decoder box and remote control), high-quality entertainment programming delivered digitally for laser disc-quality picture and CD-quality sound, and ongoing maintenance and service. Unlike other Direct

² Notice at ¶ 46.

Broadcast Satellite ("DBS") providers, PRIMESTAR does not require subscribers to purchase reception equipment.

PRIMESTAR subscribers use several different sizes of receive-only antennas depending primarily upon their geographic locations. The antenna sizes deployed in the PRIMESTAR system range from 1.0 meter or greater diameter, down to 0.9 meter and 0.75 meter. In addition, some PRIMESTAR subscribers employ elliptical antennas measuring 1.0 meters along the horizontal axis, but with a surface area equivalent to a 0.88 meter dish antenna.

For the past year, DBS providers DirecTV and USSB have provided service through high-powered Ku-band satellites that could transmit to receiving dishes somewhat smaller than those used by PRIMESTAR (approximately 18 inches in diameter). The ability to use smaller antennas provides DirecTV and USSB with several advantages over PRIMESTAR, not the least of which is relief from burdensome local regulations that affect PRIMESTAR's larger reception antennas. PRIMESTAR cannot be fully competitive with DirecTV and USSB until it migrates from medium-power satellites to DBS satellites, which it plans to do next year.³

³ PRIMESTAR's efforts to migrate to DBS satellites have been hampered by a recent Order issued by the Commission's International Bureau denying the request of Advanced Communications Corporation ("Advanced") to extend the time to complete its DBS system. In the Matter of Advanced Communications Corporation, DA 95-944, released April 27, 1995. Had the Bureau approved the Advanced application, the DBS channels allocated to Advanced would have been put to use to provide service to PRIMESTAR in 1996, which would have allowed PRIMESTAR to expand its direct-to-home service. PRIMESTAR and numerous other parties have filed applications for review of this staff decision.

II. PRIMESTAR Supports the Presumption of Unreasonableness Standard Articulated by the Commission.

PRIMESTAR supports the Commission's proposal to preempt unreasonable local regulation of satellite antennas. As the Commission recognized, direct-to-home satellite services using smaller satellite antennas are growing rapidly and are in a highly competitive mode.⁴ Smaller antennas are generally unobtrusive and, therefore, less objectionable than the much larger satellite dishes initially used by the C-band direct-to-home providers. However, PRIMESTAR's experience has been that local regulations routinely and unnecessarily restrict the use of receive-only antennas supplied by PRIMESTAR distributors. These restrictions hamper the development of PRIMESTAR's business.

The highly competitive nature of the direct-to-home business necessitates the Commission's involvement to protect service providers from overly obtrusive local regulation, such as extensive building permit requirements and high permit fees selectively applied to satellite dishes. The "time burden" of applying for permits, preparing specifications and appearing at hearings exacts a cost which is substantial and causes some consumers to be less than enthusiastic about signing up for satellite services. Consumers who subscribe to satellite services for discretionary entertainment purposes simply do not wish to endure a bureaucratic quagmire. If the regulatory process is too

⁴ Notice at ¶ 29.

burdensome, consumers will choose other entertainment alternatives.

More than 90% of PRIMESTAR's subscribers use satellite antennas no larger than 1.0 meter in diameter, or with a surface area that is the equivalent of less than a 1.0 meter dish antenna. Therefore, the proposed rule, that would presume that local regulations substantially affecting the use of 1.0 meter or smaller antennas are unreasonable, would accomplish the goals of reducing overly restrictive regulations and promoting greater access to satellite-based communications services at least with respect to many, although not all, of PRIMESTAR's current antenna systems. Adoption of the presumption of unreasonableness, therefore, should aid in the more rapid and cost efficient installation of antennas to consumers who wish to receive PRIMESTAR's service.

III. Several Provisions in the Proposed Rule Remain Ambiguous and Should be Clarified.

Concurrent with its general support of the proposed regulation, PRIMESTAR urges the Commission to clarify certain aspects of the proposed rule to reduce ambiguity and to limit the need to address challenges to the rule that could stem from these ambiguities.

Under the Commission's proposed rule, a local regulation affecting 1.0 meter or smaller antennas would be presumed unreasonable if it imposed "substantial costs on users." In defining what is "substantial," the Commission states that "it is a rather low threshold, indicating only that a federal interest

has been burdened in a way that is not insignificant, and which therefore calls for justification."⁵

In the context of PRIMESTAR's operations, the Commission should recognize that the entry "cost" to a PRIMESTAR customer is very low (an installation fee of \$150 to \$200). Thus, any local regulatory costs exceeding a few dollars would be a "substantial" additional burden on a PRIMESTAR customer. Furthermore, PRIMESTAR's distributors provide professional installation of antennas for PRIMESTAR's subscribers, which is accomplished efficiently and professionally without the need for expensive local regulatory oversight. Thus, it would be hard for any local government to justify a fee of more than a few dollars on a PRIMESTAR installation to protect the public health and safety. In view of these factors, the use of the price of an antenna as a basis for determining whether a local regulatory cost is "substantial" exposes PRIMESTAR to unnecessary and unreasonable burdens.

Accordingly, PRIMESTAR urges the Commission to clarify that, in a situation where satellite reception equipment is rented to a customer and professionally installed, any local regulatory cost that is not de minimis as compared to the installation charges would be unreasonable.⁶ Focusing on installation charges will

⁵ Notice at ¶ 58.

⁶ Also presumptively unreasonable should be the time-burden "cost" of obtaining permits or other regulatory documents from a municipal office related to the small antenna (1.0 meter) installations. These costs of compliance should also be specifically taken into account by the Commission.

continue to provide the Commission with an acceptable method of quantifying "substantial cost" and, at the same time, reduce any inequities caused by the equipment purchase/rental distinction.⁷ This approach will also eliminate the potential that PRIMESTAR will experience negative, discriminatory effects as a result of its equipment rental policy.⁸

PRIMESTAR also urges clarification of certain principles enumerated in the Notice, but which are not apparent from the text of the proposed rule. The text fails to adequately alert local authorities that the "substantial cost" threshold is intended to be a low threshold. To ensure that local authorities better understand the limits of their ability to regulate antennas, the text of the rule should emphasize that the "substantial cost" threshold is low and is defined as "not insignificant" or de minimis. In addition, the text of the proposed rule should be clarified to indicate that the phrase "or similar regulation" encompasses permitting as well as zoning, because permits and zoning restrictions, combined, could easily impose substantial

⁷ PRIMESTAR's proposed use of the de minimis standard should also be incorporated into Section (e)(3), relating to the Commission's decision to review local regulations that condition permits or other authorization on the "expenditure of an amount greater than the aggregate purchase and installation costs of the antenna." Notice at ¶ 46.

⁸ Especially in the current competitive DBS arena, the Commission should declare that local regulations that discriminate among antennas within the 1.0 meter or less class are unlawful. For instance, a regulation that 1.0 meter or smaller antennas be installed only on rooftops would have a serious negative effect on PRIMESTAR's operations but, would not effect PRIMESTAR's competitors, which currently can deploy antennas smaller than PRIMESTAR's.

costs on service providers. The permitting process slows down the provision of a large volume of installations, performed by professionals, and puts the satellite companies at a competitive disadvantage to unregulated companies which install other types of antennas, such as parabolic antennas for reception of MDS and MMDS signals, for example.

The proposed rule incorporates changes to the procedures for obtaining Commission review of local regulations. PRIMESTAR supports the proposed changes, especially the elimination of the requirement that petitioners must seek judicial relief prior to petitioning the Commission, but urges the Commission to modify the procedures to reduce the potential for abuse by local regulatory entities.

Specifically, PRIMESTAR is concerned that forcing consumers to endure local administrative proceedings that last 90 days will amount to an unreasonable delay and discourage consumers from attempting to install a satellite antenna. Thus, PRIMESTAR urges the Commission to adopt a 30-day requirement instead of a 90-day requirement. In addition, the 30-day time period should run from the date on which the consumer initially files an application at the local administrative level. Otherwise, a local authority could circumvent the 30-day time period by creating a multi-step review procedure and argue that each step triggers an additional 30 days. Similarly, PRIMESTAR urges the Commission to clarify the meaning of "pending" to prevent a local authority from taking some action to extend the time period without decisively ruling on the consumer's application. Instead of using the phrase "pending,"

PRIMESTAR suggests that a consumer should be entitled to petition the Commission if the consumer's initial application was filed more than 30 days prior to petitioning the Commission.⁹

Finally, while the Commission properly recognized the "federal interest" in protecting competition in the satellite industry, the Commission's interest in ensuring and protecting the rights of consumers to receive satellite signals is equally as important. This concept should be incorporated into the text of the proposed rule, and specifically, the waiver procedure, to ensure that local authorities recognize and understand the Commission's commitment to protecting the interests of satellite service consumers and fostering the development of the satellite industry without restrictions not applicable to other alternative technologies.¹⁰

⁹ In connection with the proposed changes to the Commission's review procedures, PRIMESTAR also urges the Commission to clarify that the definition of "expenditure" in Section (e)(3) includes any compliance-related costs.

¹⁰ Although the Notice does not address the impediments to satellite communications created by restrictions and covenants imposed in deeds and by homeowners' associations ("HOAs"), they create a substantial threat to the federal interests the Commission seeks to protect. PRIMESTAR urges the Commission to address these issues in a separate proceeding in the very near future.

IV. Conclusion

Because the Commission's proposed rule provides greater protections to satellite television consumers and providers, PRIMESTAR generally supports the proposed rule and urges the Commission to clarify several ambiguities as discussed herein.

Respectfully submitted,

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